No. 90-70

In The

Supreme Court of the United States

October Term, 1990

MAY DEPARTMENT STORES COMPANY,
VENTURE STORES DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

LOCAL 881, UNITED FOOD AND
COMMERCIAL WORKERS UNION,
Chartered by United Food and Commercial
Workers International Union, AFL-CIO, CLC,

Intervenor-Respondent.

BRIEF OF INTERVENOR-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a substantial question of federal law warranting review by this Court of the National Labor Relations Board's finding in this case that there is no question of representation raised by the affiliation of the United Retail Workers Union with the United Food and Commercial Workers Union.

2. Whether there is a split in the decisions of the United States Circuit Courts warranting review by this Court of the issue of the need for a unit-by-unit vote in union affiliation elections to meet the "due-process" safeguards fashioned by the National Labor Relations Board in union affiliation cases.

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BRIEF FOR THE INTERVENOR-RESPONDENT

I. COUNTER STATEMENT OF THE CASE

A. This case arises from the affiliation of the United Retail Workers Union ("URW") with the United Food and Commercial Workers International Union ("UFCW") during August, 1981. The affiliation created the United Retail Workers Union, Local 881 ("Local 881").

At the time of the affiliation, URW had approximately 20,548 members of which approximately 1,292 were employed by May Department Stores Company, Venture Stores Division ("Venture"). (J.A., 78)[1]. UFCW had approximately 1.3 million members. (J.A., 75).

Venture's predecessor, Jewel Companies, Inc., d/b/a Turnstyle Stores, first recognized the URW in 1962. (J.A., 68-69). When Venture purchased the Turnstyle operation in 1970, it continued to recognize the URW. (J.A., 71-72).

URW represented employees in two Venture bargaining units. (J.A., 71-73). One of those units consisted of ten stores in the Chicago metropolitan area and the other was confined to a single store in Decatur, Illinois. (*Id.*) URW had agreements with Venture in both units. The most recent Chicago area agreement was effective from July 21, 1980 through July 24, 1983. The Decatur agreement was

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[1] This case was initially presented to the National Labor Relations Board in the form of stipulated facts and exhibits. On appeal, this record was consolidated into a Stipulated Joint Appendix. Page numbers cited in this Brief will correspond to the pagination appearing in the Stipulated Joint Appendix submitted on appeal and will be designated as (J.A., ___).

effective from January 1, 1981 through December 31, 1983. (J.A., 72-73)

On June 22, 1981,[2] the URW Executive Council, Board of Governors and Staff Supervisors, together with UFCW International President Wynn, adopted a resolution endorsing affiliation of URW with the UFCW. (J.A., 76-77; J.A., 246).

Thereafter, URW took numerous steps to effectuate this decision. On June 23, URW National Executive Director, Fred Burki, sent a letter to all URW members regarding the proposed merger; this letter was accompanied by an information pamphlet on the UFCW. (J.A., 77; J.A., 247-255). On June 25 all URW stewards or their alternates were invited to a special affiliation conference to be held on June 27. (J.A., 77; J.A., 257-259). On July 10, URW mailed a "Notice of Meeting and Mail Ballot Referendum" to all of its members. (J.A., 79; J.A., 286). The proposed "merger agreement" and its appendices, (J.A., 229-244), were enclosed with this notice. (J.A., 79). Meetings for the general membership were scheduled for July 28 through July 31. (J.A., 286).

On July 14, URW posted reminders of these scheduled meetings and the upcoming mail ballot referendum at all employer locations. (J.A., 79). On July 27, the special affiliation conference for stewards and local union officers was held as scheduled. (J.A., 80). Conferences began at 8:00 a.m. and closed at about 7:00 p.m. (J.A., 290-293). UFCW and URW officials participated in six "business

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[2] All dates are 1981 unless otherwise noted.

sessions" and all stewards and officers had an opportunity to ask questions at each session.

Eight meetings for the membership were held as scheduled on July 28 through July 31. (J.A., 80; J.A., 294). Representatives of URW and UFCW were present at all meetings; a question and answer period was held prior to the close of each meeting. (J.A., 80). In addition to the materials already noted, URW mailed out newspapers and pamphlets about the proposed affiliation to its members on July 1, July 27, and July 31. (J.A., 83-84; J.A., 303-312). From about June 23 through August 20, URW provided pre-recorded messages about the proposed affiliation on a telephone "hotline". (J.A., 83-84).

On or about July 31, Walenza Direct Mailing, a mailing service hired by URW, mailed voting instructions on the referendum ballot, (J.A., 297-300), to all active URW members on the employer's payroll as of the last payroll date before July 31 and non-members on the payroll of a covered employer as of the last payroll date before July 31 who would have completed their 31-day probationary period by that time or from whom URW had received a membership application before that time. (J.A., 81). By August 20, the cut-off date for receiving ballots, 9,325 out of a total of 20,548 were returned. (J.A., 82). LaSalle Bank opened and tabulated the return ballots on August 21. (J.A., 82). Three hundred eighty-nine ballots were received from Venture employees. (J.A., 82-83). Of the total ballots, 6,823 "yes" votes were cast, 2,344 "no" votes were cast, 68 votes were invalid. (J.A., 82; J.A., 302).

With the exception of Venture, all employers recognized Local 881 as the URW successor and honored existing contracts. (J.A., 87). There was no evidence of any objection from any employee in the bargaining units represented by URW.

Prior to the affiliation, URW was directed by its Board of Governors and Executive Council. (J.A., 177-191, Art. VII [URW Bylaws]). Chief officers were National Executive Director, Fred Burki and National Executive Vice President/Treasurer, Frank Koukl. (J.A., 74). All collective bargaining authority resided in the Board of Governors and Executive Council. (J.A., 172-191, URW Bylaws, Art. VII). Contract proposals were submitted to members of the affected unit for ratification. (J.A., 172-191, URW Bylaws, Art. VII, Sec. 9).

Although URW was divided into four "local unions", these local unions did not have authority to bargain with employers, resolve grievances, discipline members, pledge credit, or authorize expenditures. (J.A., 74-75). URW Local Union officers were not employed by URW and received no pay for their services in that capacity. (J.A., 74-75).

The URW charged initiation fees and dues. (J.A., 177-191, URW Bylaws, Art. XVI). The amount of such fees was determined at the URW's National Convention. (J.A., 177-191, URW Bylaws, Art. XVI, Sec. 2).

Subsequent to the affiliation with the UFCW and the creation of Local 881 out of the URW, the Union retained its autonomy and integrity. (J.A., 229-244, Art. IV). Local 881 operated as a local union chartered by the UFCW. (J.A., 229-244, Art. IV). Local 881 continued to administer

the URW collective bargaining agreements. (J.A., 283-284; J.A., 318-319; J.A., 229-244, Merger Agreement, Art. I(A)). Local 881 operated under the name of United Retail Workers Union, Local No. 881, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC. (J.A., 229-244, Merger Agreement Appndx. A [Local 881 Bylaws]). Local 881 retained control over the former URW's property and funds. (J.A., 229-244, Art. III(c); J.A., 87). Members of the URW were repeatedly informed that Local 881 would remain autonomous and be identical to the URW in scope and operations. (J.A., 229-244, Merger Agreement; J.A. 260-270; J.A., 303-304; J.A., 305; J.A. 306-312.)

Local 881 was directed by a General Executive Board and an Executive Council. (J.A., 229-244, Merger Agreement, Appndx. A, Art. VIII). Chief officers were the President, and Secretary/Treasurer. Burki and Koukl retained these positions. Other officers were the Recorder and twenty-two Vice-Presidents. (J.A., 229-244, Merger Agreement, Art. VII).

As the below chart indicates, subsequent to the affiliation, there was absolutely no change in personnel filling leadership positions:

Officers	Pre-Affiliation Office	Post-Affiliation Office
Fred Burki	National Executive Director	President
Frank Koukl	National Exec. V.P./Treasurer	Secretary/Treasurer
Thomas Walsh	Staff Officer	Recorder
Mary Tapia Barthel	Board of Governors	V.P., Gen. Exec. Bd.

Dan Bock	Board of Governors	V.P., Gen. Exec. Bd.
Charles A. Cousins, Jr.	Board of Governors	V.P., Gen. Exec. Bd.
Stephen Hyde	Board of Governors	V.P., Gen. Exec. Bd.
Patrick Kissane	Board of Governors	V.P., Gen. Exec. Bd.
Bonnie Kreye	Board of Governors	V.P., Gen. Exec. Bd.
Nancy Maye Martinez	Board of Governors	V.P., Gen. Exec. Bd.
Melanie Navarro	Board of Governors	V.P., Gen. Exec. Bd.
Marcella Purkiser	Board of Governors	V.P., Gen. Exec. Bd.
Jean Reifsteck	Board of Governors	V.P., Gen. Exec. Bd.
Elaine Sabino	Board of Governors	V.P., Gen. Exec. Bd.
Billie Louis Sims	Board of Governors	V.P., Gen. Exec. Bd.
William (Red) Taylor	Board of Governors	V.P., Gen. Exec. Bd.
Dale Thomas	Board of Governors	V.P., Gen. Exec. Bd.
Thomas E. Bothen	Staff Officer	V.P., Gen. Exec. Bd.
Judy Dunteman	Staff Officer	V.P., Gen. Exec. Bd.
Ed Jablonski	Staff Officer	V.P., Gen. Exec. Bd.
Larry Jackson	Staff Officer	V.P., Gen. Exec. Bd.
Roberto McFarlane	Staff Officer	V.P., Gen. Exec. Bd.
Tom Padgett	Staff Officer	V.P., Gen. Exec. Bd.
Ron Powell	Staff Officer	V.P., Gen. Exec. Bd.

(J.A., 229-244, Appndx. B; Compare J.A., 74, with J.A., 87-88).

Article II of the Merger Agreement guaranteed that the leadership body made up of the former officers and Board of Directors of the URW would hold their positions for three years. (J.A., 229-244, Merger Agreement, Art. II(C)). The identity of the membership remained unchanged by the affiliation and this identical membership continued to elect its union representatives. (J.A., 229-244, Merger Agreement, Appndx. A, Art. XII). All officers continued to be elected by secret ballot vote of this membership. (J.A., 229-244, Merger Agreement, Appndx. A, Art. XII). Local 881 selected its own staff and hired its own counsel and other professionals to assist it. (J.A. 229-244, Merger Agreement, Appndx. A, Art. VII(C)(4), (5), (6)). Local 881 retained all staff employees. (J.A., 87).

Generally, the same contract ratification procedures were followed as under the URW. Just as under the URW Bylaws, the UFCW constitution provides that final ratification of proposals requires a majority vote of the affected membership. (Compare J.A., 193-228, Art. 23(a)(4)[UFCW Const.] with J.A., 177-191, Art. 7, Sec. 9[URW Bylaws]).

Strike authorization is also a matter that is left to Local 881's membership. Under the UFCW Constitution a strike vote requires a two-thirds majority of the affected membership. (J.A., 193-228, Merger Agreement, Art. 23, Sec. 6).

Article XV of Local 881's Bylaws establishes the Local Union's continuing exclusive authority to interpret and enforce collective bargaining contracts, to submit grievances to arbitrations, to withdraw grievances and to settle

and compromise grievances. (J.A., 229-244, Merger Agreement, Appndx. A, Art. XV(A).

Local 881 retained the authority to set its own initiation fees and dues. These levies could be changed by majority vote of the membership. (J.A., 229-244, Merger Agreement, Appndx A, Art. XI). There was no evidence of an affiliation related dues increase.

Local 881 could also establish and amend its own Bylaws. Such amendments required the vote of two-thirds of the membership. (J.A., 229-244, Merger Agreement, Appndx A, Art. XVII).

Local 881 maintained control over disciplinary matters. (J.A., 229-244, Merger Agreement, Appndx A, Art. XIV). Under the disciplinary procedure established in the Bylaws, members who stood accused of misconduct were charged and tried in the Local Union. (J.A., 229-244, Merger Agreement, Appndx A, Art. XIV).

Finally, subsequent to the affiliation, the previous URW "Local" unions became administrative districts of Local 881. (J.A., 229-244, Merger Agreement, Art. III(A)).

Based on the results of the vote, the URW affiliated with the UFCW on November 1, 1981 becoming the United Retail Workers Union, Local 881 chartered by the UFCW. (J.A., 85-86; J.A., 229-244 Merger Agreement). Thereafter, Venture stopped recognizing the Union and ceased dealing with it as the representative of its employees. (J.A., 85-86).

Local 881 filed a National Labor Relations Board (hereinafter "Board" or "NLRB") charge over Venture's refusal to bargain and related unfair labor practices. The

Board reviewed this matter in *May Department Stores Company, Venture Stores Division*, 268 NLRB 1979 (1984) (*"Venture I"*). Relying on its decision in *Amoco Production Company*, 262 NLRB 1240 (1982) (*"Amoco III"*), the Board concluded that Venture had not violated the Act. The Board based this holding on the URW's failure to allow non-members to vote in the referendum election it held prior to its affiliation with the UFCW. Under the *Amoco III* rule, this procedural defect invalidated the affiliation.

The Seventh Circuit affirmed the Board in *URW Union, Local 881 v. NLRB*, 774 F.2d 752 (1985). This Court granted certiorari.

Subsequently, however, this Court, in *NLRB v. Financial Institution Employees of America, Local 1182*, 475 US 192 (1986) (*"FIEA"*), struck down the *Amoco III* rule. This Court then remanded this case to the Seventh Circuit which, in turn, held that the NLRB could not require non-members to vote as a precondition for the affiliation of the URW with the UFCW. The Seventh Circuit remanded this matter to the Board for findings on the continuity of representation and due process questions. *URW Union, Local 881 v. NLRB*, 797 F.2d 421 (1986).

On Remand, the Board concluded that Venture had violated the Act. The Board found that there was continuity of representation between the URW and Local 881 and that adequate due process safeguards were observed during the affiliation process. *May Department Stores Company, Venture Stores Division*, 289 NLRB No. 88 (1988) (*"Venture II"*).

The Seventh Circuit enforced the Board's order. *May Department Stores Company, Venture Stores Division v. NLRB*, ___ F.2d ___, 133 LRRM 2745 (Feb. 1990). It is from this last decision which Venture petitions for certiorari.

II. REASONS FOR DENYING THE WRIT

A. Contrary to Venture's Argument, the NLRB's Continuity Finding is Consistent With Well-Settled Federal Law.

The National Labor Relations Board's finding that there is not a question of representation in this matter is entirely consistent with this Court's decision in *FIEA* and with prior decisions of the Board and the Courts of Appeals on this question. The NLRB, supported by the Seventh Circuit in its decision on appeal in this case, found that the affiliation involved here did not affect continuity of representation. As the above recitation of the factual background herein establishes, there is overwhelming evidence supporting the Board's continuity finding.

According to Board precedent, such continuity exists where there is no significant structural, administrative, jurisdictional or personnel changes and where the local union continues to engage in organizational activity and to administer its existing contracts. E.g., *Pearl Bookbinding Company*, 206 NLRB 834 (1973), enfrcd. *sub nom. NLRB v. Pearl Bookbinding Company*, 517 F.2d 1108 (1st Cir. 1975). See also, *Amoco Production Company v. NLRB*, 613 F.2d 107 (5th Cir. 1980). In general, continuity is maintained when

the same collective bargaining agreements are administered by the same personnel in the same manner as before. *Commercial Letter, Inc. v. NLRB*, 496 F.2d 35 (8th Cir. 1974). Manifestly, the instant affiliation meets all of these standards.

Post affiliation, Local 881 was led by exactly the same group of officers who directed the organization prior to the affiliation. The merger agreement expressly recognized Local 881's autonomy. There were absolutely no changes in leadership, staff, bargaining agreements, grievance handling, collective bargaining procedures, membership, assets and dues or the scope of the bargaining units.

This case is directly parallel to *American National Insurance Company*, wherein the Board held:

> The record evidence is clear and uncontroverted that the merger has not affected contract negotiations and contract administration. The same union personnel who performed these activities before the merger continue to do so afterwards, contracts continue to be ratified by secret ballot at the local union level, contracts continue to be executed by Pollack and grievances continue to be processed at early steps by the locals . . . No other UFCW official has any authority to negotiate.

281 NLRB 713, at 716 (1986). Significantly, *American National Insurance Company* involved an affiliation with the UFCW, as does this matter.

Equally applicable is the decision in *Good Hope Industries, Inc. d/b/a Gasland, Inc.*:

> "That the Gasland Employees Association and OCAW are in fact the same bargaining entity,

> with the former now functioning as the latter, is further indicated by certain other factors. For instance, International representatives of OCAW assured the Association's officers and members in the pre-affiliation meetings that they would continue to operate as their own independent union, and that the Gasland employees would represent themselves as a separate unit of the OCAW organization. These assurances were honored following the affiliation with the Gasland Organization continuing in the form of a separate unit within a local of OCAW. As such, the Gasland employees elect their own officers, have regular membership meetings attended only by the Gasland drivers, and are entitled to negotiate their own contracts which are subject to ratification only by the employees within the unit. They also filed their own grievances, and processed them up to the arbitration stage. Moreover, the officers of the Gasland unit within OCAW are the same individuals who were the officers of the Association. Thus, the unit employees continue to retain their organizational unit autonomy under the same leadership and continue to honor their pre-affiliation contract with the Respondent as well. The unit employees have, therefore, enjoyed continuity of their collective bargaining representation, following the affiliation action. (Citations omitted)

239 NLRB 611, 612 (1978).

In each major area of concern to the continuity question – contract bargaining and administration, identity of the membership, autonomy in electing officers, authority to set dues, and control over assets – Local 881 remains essentially unchanged from the URW.

If the Board were to have found lack of continuity in this matter, it would not only have represented a sharp

break from previous Board precedent, but would nullify this Court's admonishment in *FIEA* that:

> "the Board's 'continuity' decision must take into account that 'the industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment would result in displacement in the employer-bargaining representative relationship.' " (citation omitted).

475 U.S. at 202-203. This Court also in *FIEA* approved the Board's recognition that:

> " . . . affiliation does not directly involve the employment relations. The status of wages, working conditions, benefits and grievance procedures is unaffected by the affiliation vote; the collective bargaining agreement between the union and employer remains effective until the stated expiration date. (citation omitted). Affiliation, 'has no probative value concerning the employee's choice of the [union] as to collective bargaining representative.' (Citation omitted). ('[t]he Board has in general found that affiliations do not destroy continuity of representation')."

475 U.S. at 203, n. 10.

Thus, the Board's decision in this matter not only is not in conflict with prior decisions on this issue, but is perfectly consistent with this Court's opinion in *FIEA*. Any other result would have represented an abuse of discretion by the Board.

Venture, in its Petition for Certiorari,[3] contends that the Board's decision conflicts with the following three

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[3] Hereinafter cited as "Ven. Pet., ___".

Third Circuit decisions finding a lack of continuity of representation where there was a diminution in local union autonomy. *American Bridge Division, United States Steel Corporation v. NLRB*, 457 F.2d 660 (3rd Cir. 1972); *NLRB v. Bernard Gloekler North East Company*, 540 F.2d 197 (3rd Cir. 1976); and *Sun Oil Company v. NLRB*, 576 F.2d 553, 557 (3rd Cir. 1978). See, Ven. Pet., 9. Venture's argument is unpersuasive.

First, each of those cases was decided before this Court's decision in *FIEA*. This Court's emphasis in *FIEA* on maintaining industrial stability and the concomitant recognition that affiliations generally do not raise questions of representation, overrules any implication to the contrary which can be drawn from the Third Circuit decisions. *Seattle First National Bank v. NLRB*, 892 F.2d 792 (9th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2618, Docket No. 89-1476, (June, 1990) (enforcing the Board's Order in *FIEA* after remand from this Court).

Furthermore, the decisions relied on by Venture are readily distinguishable from the instant matter. In *American Bridge Division, supra*, an independent union affiliated with the United Steelworkers. Subsequent to its absorption into the Steelworkers, the local union could not strike without International approval; the presentation, adjustment, and settlement of grievances as well as the settlement of all other matters relating to the terms and conditions of employment, vested in the International; dues checkoffs were remitted to the International; and the International had the power to determine when strikes would be called and when contracts would be signed. Most importantly, the Steelworkers constitution made the

International a joint exclusive bargaining representative with the local. *Id.*, at 664, n. 3.

In the instant case, in contrast, the primary authority to make all these decisions rests with Local 881. Article 23 of the International Constitution specifically provides that the International does not become a party to any collective bargaining agreement. (J.A., 193-228).

NLRB v. Bernard Gloeckler, supra, the second Third Circuit decision relied on by Venture, involved facts which were very similar to *American Bridge.* There, an independent union was absorbed by a United Auto Workers union local. After the merger, the pre-existing UAW local's leadership took over control of the grievance and arbitration procedure, had veto power over strikes, and maintained exclusive authority over day-to-day decisions about shop problems. Furthermore, the power to call strikes rested in the hands of the UAW International pursuant to the parent union's constitution. Here again, instead of the same union officers continuing to represent the same people in the same manner as prior to the succession, a whole new set of union representatives took over the most basic collective bargaining functions. This is simply not true in the instant matter wherein the identity and organizational integrity of the URW survived the affiliation and creation of the autonomous Local 881.

Finally, in *Sun Oil Company v. NLRB, supra,* the Third Circuit was once again faced with a union which had lost its former organizational integrity and autonomy subsequent to its absorption by another union. In that matter, an independent joined the Oil, Chemical and Atomic

Workers Union. The OCAW constitution required that the company bargain with the International Union. It also prescribed a mandatory constitution and bylaws. The OCAW International assumed control over the initial decision to strike, and the International audited the Local's financial records. This degree of control by the new body, the International, represented a movement of the locus of authority away from the local and to this new group. This is a dramatically different picture from the facts presented by this case.

Venture claims the shift in authority to the UFCW International in this matter parallels the facts in the above Third Circuit cases. However, Venture has grossly exaggerated the degree to which the UFCW International Union has the power to make decisions affecting collective bargaining on the local level. Venture, in its Petition, cites the following indicia of UFCW International authority:

> "1) The UFCW Washington headquarters had to approve bargaining proposals before they could be submitted in negotiations; 2) the UFCW International President could require agreements reached at the bargaining table to be submitted to him and if he did not approve the agreement, the agreement could not even be submitted to the employees in the bargaining unit for ratification; 3) even if the employees in the bargaining unit voted to reject the final offer of the employer in negotiations, they could not strike without the approval of the International Union; 4) union strike funds could not be utilized to support a strike desired by the employees in the bargaining unit unless approval was granted by the International Union."

Ven. Pet., 7-8.

With regard to these points, first it should be noted that what Article 23(A) of the UFCW Constitution actually states is that, "The terms of proposed collective bargaining contracts shall be submitted to the office of the International President for approval *upon request* prior to membership action thereon." (emphasis added) (J.A., 207). Similarly, Article 23(D)(2) requires, "A copy of such initial proposals, and all subsequent modifications thereof, shall be submitted to the office of the International President for approval immediately *upon request*." (emphasis added) (J.A., 207) In *Seattle First National Bank*, 290 NLRB No. 72 (1988), (*Seattle First III*), (the Board's supplemental decision after the *FIEA* remand), the Board considered similar, if not identical, language in the Retail Clerk International Union's constitution as it related to the continuity issue.[4] The Board held that the "upon request" language did not represent a significant diminution in the local's autonomy. "Upon request" meant simply that the International Union could review a proposal to prevent a "sweetheart" deal from undercutting other bargaining agreements. The Board further found that this section of the RCIU's (now UFCW) constitution was not enforced and that the locals generally negotiated their own contracts. As can be readily seen from Local 881's Bylaws, Local 881's membership continues to have the right to ratify contracts by majority vote. (J.A., 229-244,

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[4] The RCIU and UFCW constitutions were nearly identical in this respect because the UFCW was created out of a merger of the Retail Clerks' Union with the Amalgamated Meat Cutters Union. See, *Seattle First National Bank*, 245 NLRB 700 (1979)(the second Board decision in the *FIEA* case).

Merger Agreement, Appndx A. [Local 881 Bylaws]). Venture simply exaggerates the degree of the UFCW International's authority in an attempt to magnify the loss of decision-making power at the local union level.

Venture similarly contends that there has been a transfer of strike authorization power to the UFCW International. Venture contends that employees represented by Local 881 could not strike without UFCW International approval and that those employees who did strike without approval would not receive strike funds. The Board also addressed this issue in its *Seattle First III* decision. The Board there found that the RCIU (now UFCW) constitution,

> " . . . indicates that the president's approval ensures compliance with the constitution and exhaustion of all amiable means of adjustment prior to engaging in economic sanctions in an effort to protect membership interests. *If a local engages in a strike without approval, however, the penalty is only a denial of strike benefits. The International also cannot force a local to participate in a strike.* (emphasis added)(footnote omitted).

Thus, although the UFCW does retain authority to approve strike benefits, it could neither order a local out on strike nor directly prevent a strike should a local wish to engage in one.

The Ninth Circuit, in enforcing the Board's *Seattle First III* decision, endorsed the Board's factual findings and legal conclusions regarding the significance of this similar delegation of limited powers to the International

Union. *Seattle First v. NLRB, supra* at 799-800.[5] The Court concluded that the Board's decision warranted substantial deference, *Id.*, at 799, and that such transfer of limited authority did not amount to a "sufficiently dramatic" change to disrupt continuity and raise a question of representation. *Id.* at 798-800. There is simply no authority supporting Venture's contention that, under circumstances similar to this case, continuity of representation does not exist.

In *NLRB v. Insulfab Plastics, Inc.*, 789 F.2d 961 (1986) the First Circuit rejected an argument identical to Venture's. In that matter, as here, a small independent affiliated with a large international union. Also as here, such an affiliation necessarily resulted in the transfer of some authority to the parent organization. Despite this fact, the Court, in enforcing the Board's order, held:

> The Board supportedly found, however, that the Union's local automony is not significantly curtailed. The Union continues to retain control over negotiating and administering contracts, processing grievances, and calling strikes, with assistance from the IUE only when requested.

789 F.2d at 966-967. The same conclusion applies here.

Contrary to Venture's argument, the question of whether continuity existed post-affiliation in this case does not present an important question of federal law. The law in this regard is well settled. The Board's decision is not only consistent with its own past precedent

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[5] This Court's denial of the Employer's Petition for Certiorari in *Seattle First* is perhaps sufficient argument, standing alone, for a similar result here.

and the decisions of the Courts of Appeals in this area, but is strongly supported by this Court's decision in *FIEA*. Under these circumstances, a Writ of Certiorari should not be granted on this issue.

B. There Is No Current Conflict Among the Circuits On Whether, In The Absence Of A Question of Representation, A Union Affiliation Vote Must Be Taken On A Unit-By-Unit Basis.

Venture's second argument in its Petition contends that there is a split in the Circuits concerning whether a union affiliation election, to meet due process safeguards, must involve a poll of employees on a unit-by-unit basis. Venture argues that without a vote by each unit acting independently, union affiliation elections are invalid. Venture cites two Sixth Circuit cases for this proposition: *NLRB v. Canton Sign Company*, 457 F.2d 832 (6th Cir. 1972) and *William B. Tanner Company v. NLRB*, 517 F.2d 982 (6th Cir. 1975). Here again, the primary fault with Venture's argument is that it ignores the fact that the cases upon which it relies were decided prior to this Court's decision in *FIEA*.

In *FIEA*, this Court overruled the Board's imposition of a standard requiring that non-members be allowed to vote in all union successorship elections. This Court found the Board powerless to impose such restrictions absent a finding that a question concerning representation was raised by lack of continuity. As stated by the Court:

> Congress has expressly declined to prescribe procedures for union decision making in matters such as affiliation . . . ('The Senate conferees . . . felt that it was unwise to authorize [the NLRB] to undertake such elaborate policing of the internal affairs of unions.')

475 U.S. at 204, n. 11.

The basic premise of the *FIEA* decision was that, absent sufficient disruption of continuity to raise a question of representation, the Board's power to intervene and create strict guidelines for union reorganizations was severely limited. Therefore, the Board acted without authority in imposing the non-member voting requirement.

Despite this clear instruction, Venture now suggests that this Court should do exactly what it previously admonished against doing – which is to create a new procedural hurdle to union affiliations even though there is otherwise no disruption in continuity. However, the *FIEA* holding has, once and for all, foreclosed this approach.

Furthermore, the precedent relied on by Venture to support this argument is, in any event, extremely thin. While in *William B. Tanner v. NLRB, supra,* the Sixth Circuit did deny enforcement to a Board order finding no need for a unit-by-unit procedure, the Court's opinion was rendered without analysis and stated simply that substantial evidence on the record as a whole did not support the Board's successorship finding. In the other case relied on by Venture, *Canton Sign Company, supra,* the Court found there was inadequate evidence that

employees of a particular unit were allowed to participate in a common, multi-unit vote. Here, of course, the employees in the Venture bargaining unit did have the chance to participate in the common vote. Under these circumstances, the Sixth Circuit's cases do not represent a substantial conflict with the Seventh Circuit decision in the instant matter.

The Board has also uniformly refused to require unit-by-unit votes to validate union successorship elections. Note, *Union Affiliation Collective Bargaining*, 128 U. of Pa. L. Rev. 430, 463 (1979). See also, *House of the Good Samaritan*, 240 NLRB 539 (1980); *Fox Memorial Hospital*, 247 NLRB (1980); *American Enka Company*, 231 NLRB 1335 (1977). Since the *FIEA* decision, no courts have endorsed Venture's argument. The Second Circuit, in *NLRB v. Eastern Connecticut Health Services*, 815 F.2d 517 (1987), *cert. denied*, 484 U.S. 846, 108 S.Ct. 140 (1987), expressly rejected this approach.

Venture's last argument is that its employees were denied their democratic right to vote by the co-mingling of the ballots from the various units. Venture claims that since all votes of this nature inherently impact on representation at the unit level, votes must be taken on a unit-by-unit basis.

This argument simply rests on a completely false premise. Under *FIEA*, the continuity finding comes first and determines whether the change in organizational structure is sufficient to alter the representative. The Board, having found in this case that there was no substantial impact on the bargaining representative due to the affiliation, concluded that the bargaining relationship

was not impacted by the change in union organizational structure. Therefore, there was no need to seek out sentiment in each individualized unit.

In *FIEA*, this Court recognized that, once it is established that there is continuity, and no direct impact on the bargaining relationship, the affiliation is a purely internal union matter. As such, it is up to the union to decide the nature of the vote and other procedures for making a decision. 475 U.S. at 204, n.11.

Where there is no question of representation, there is not, nor can there be, any requirement that union decisions be made unit-by-unit. For example, elections for union officers are not necessarily on a unit-by-unit basis, nor are changes in union constitutions. *Id.* at 205-206. Although these decisions have as much, if not more, impact on the bargaining unit as the affiliation herein, the Board, with the endorsement of this Court in *FIEA*, has recognized that it has little power to intrude. See *Amoco Production Company*, 239 NLRB 1195 (1979) (*Amoco II*) (and cases cited in note 5 therein).

Since there is no obligation to make a decision such as this on a unit-by-unit basis, Venture's argument that the dilution of its employees' votes by the co-mingling process deprives them of their due process rights has no legal or logical support. The URW and the UFCW here determined that the decision should be made on a union-wide basis. The union has the authority to make this decision under this Court's decision in *FIEA* and applicable Board precedent. Therefore, Venture's attempt to raise this point through its Petition for Certiorari should be rejected.

CONCLUSION

This Court should deny Venture's Petition For Certiorari. The Board supportably found that the affiliation of the URW with the UFCW did not raise a question of representation. This Court's own decision in *FIEA* and prior Board precedent, as well as decisions of the Circuit Court of Appeals, endorse the Board's analysis of this issue as applied to this case. The Board's decision does not conflict with well settled principles of federal law on this issue. Similarly, this Court's decision in *FIEA* is in direct conflict with Venture's argument that even where there is continuity of representation, union affiliation votes must take place on a unit-by-unit basis. Here again, the issue raised by Venture does not warrant review by this Court since the *FIEA* decision precludes Venture's argument. Under these circumstances, we respectfully submit that the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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